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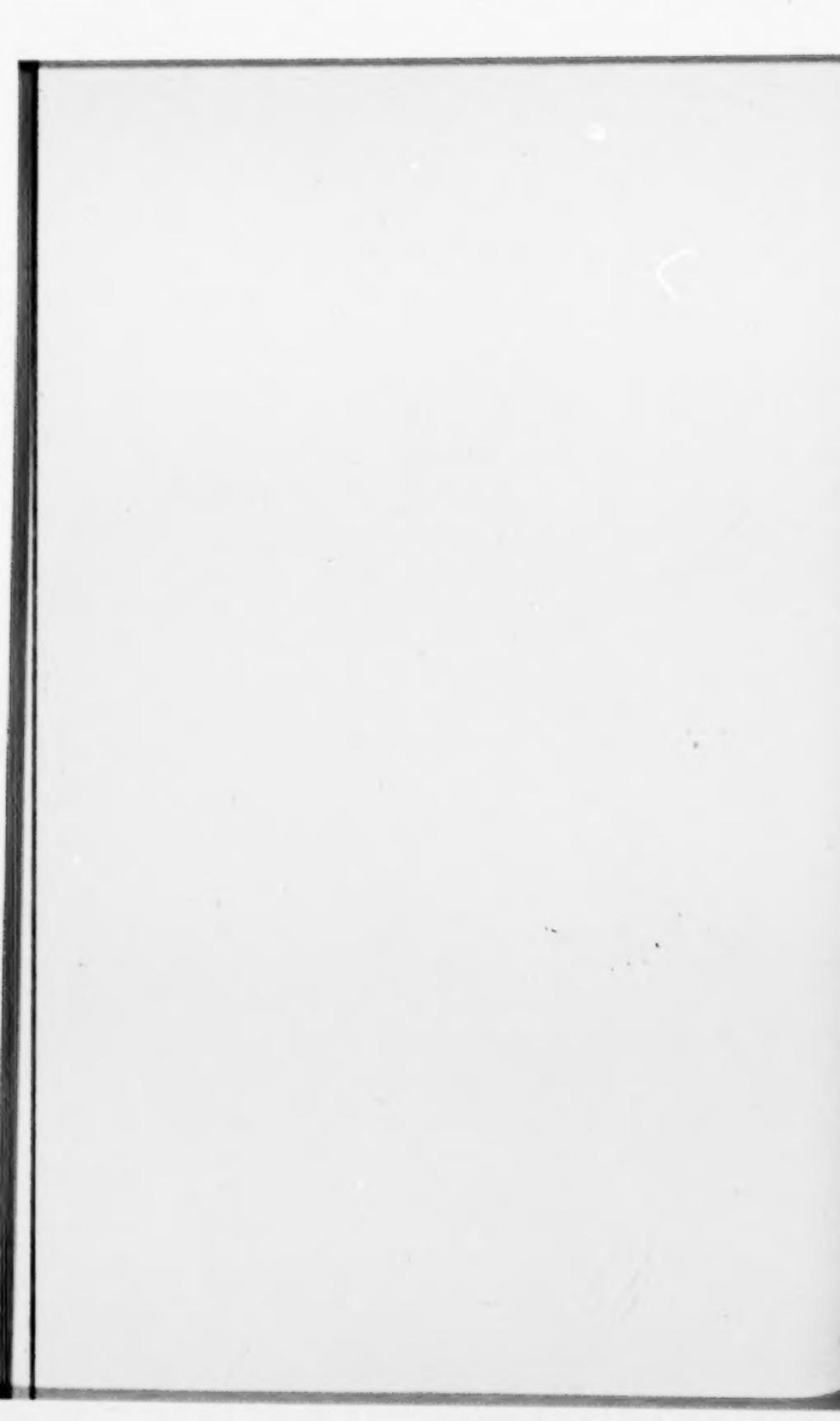
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1291

FRANK ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 88-90) is reported at 148 F. 2d 140.

JURISDICTION

The judgment of the circuit court of appeals was entered March 29, 1945 (R. 90), and a petition for rehearing was denied April 18, 1945 (R. 94). The petition for a writ of certiorari was filed May 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The principal question presented is whether under the mandate of this Court in *Roberts v. United States*, 320 U. S. 264 (in which the Court held that the district court was without power, when it revoked petitioner's probation, to increase the two-year suspended sentence originally imposed upon him), the district court was required only to set aside the increased sentence and order execution of the original sentence or was required, in addition, to conduct a *de novo* inquiry to determine whether petitioner's probation should be revoked.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Sections 1 and 2 of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259, *et seq.*, as amended by the Act of June 16, 1933, c. 97, 48 Stat. 256, 18 U. S. C. 724, 725) are:

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia,¹ when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life

¹ The District of Columbia had its own probation statute (see D. C. Code, Title 24, Secs. 101-105).

imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a war-

rant, or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

This proceeding is a sequel to *Roberts v. United States*, 320 U. S. 264. The litigation commenced in 1938 when petitioner pleaded guilty to an indictment charging a violation of 18 U. S. C. 409 and was sentenced to imprisonment for two years and to pay a fine of \$250. The court, however, suspended execution of the sentence conditioned upon payment of the fine and ordered petitioner's release on probation for a five-year period. In June 1942, within the probation period, petitioner was brought before the court and charged with violating the conditions of his probation. Finding that he had in fact violated his probation, the court entered a judgment revoking it, setting aside the two-year sentence, and sentencing petitioner to imprisonment for three years. (320 U. S. at p. 265; R. 5-7, 10-11, 18-20.) Upon appeal to the Circuit Court of Appeals for the Fifth Circuit,

that judgment was affirmed, but this Court thereafter reversed, holding that a court may not upon revocation of probation set aside a sentence previously imposed and increase the term of imprisonment. The mandate of this Court directed that the case be remanded to the district court "for further proceedings in conformity with the opinion of this Court" (R. 75-77). In the district court, on remand of the case, petitioner contended that the mandate required that court to conduct a new hearing to determine whether probation should be revoked (see R. 32-33). The district court, however, did not so construe the mandate. Instead, on the basis of the original order revoking probation, it entered an order setting aside the three-year sentence imposed on June 16, 1942, and ordered petitioner committed "for two years under the former sentence." (R. 67, 25-30.) Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, this order of the district court was affirmed (R. 90).

ARGUMENT

1. We find no basis in this Court's decision or in its mandate for petitioner's contention (Pet. 12-17, 22-23) that the district court was required upon the remand of the case to conduct a *de novo* hearing to determine whether petitioner's probation should be revoked. Rather, we think it plain that the only function open to the district court upon receipt of the mandate was to vacate the order imposing the increased sentence and to

enter an order committing petitioner to imprisonment for a term not in excess of the sentence originally imposed. This is made manifest when it is recalled that when this case was first in the circuit court of appeals and in this Court the sole contention advanced by petitioner was that the three-year sentence was excessive; the propriety of the district court's finding that petitioner had violated the conditions of his probation was not challenged in any respect. This Court expressly stated in its opinion that "All we now hold is that having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment." 320 U. S. at pp. 272-273. Nothing in the opinion or in the mandate casts any doubt upon the propriety of the district court's action in revoking petitioner's probation. Indeed, the decision implicitly assumed that a valid order of revocation of probation had been entered.

As the circuit court of appeals points out (R. 90), the situation presented by the case is no different from that presented upon appeal from a judgment of conviction on the ground that the sentence imposed by the district court exceeds that prescribed by statute. A reversal on such ground obviously does not mean that the defendant is entitled to a new trial on the issue of his guilt. It means only that the district court is com-

manded by the mandate of the appellate court to vacate the judgment imposing the excessive sentence and to resentence the defendant. See *Braverman v. United States*, 317 U. S. 49, 55; *In re Bonner*, 151 U. S. 242, 259-262; *Robinson v. United States*, 143 F. 2d 276, 278 (C. C. A. 10); *Phillips v. Biddle*, 15 F. 2d 40, modified, 18 F. 2d 582 (C. C. A. 8). Similarly, we think that in this case the district court correctly concluded that its sole function was to vacate the excessive sentence imposed upon petitioner when it revoked his probation and to sentence him to imprisonment for no more than the two-year sentence originally imposed. Since the district court ordered petitioner committed to serve that sentence, there can be no question, and petitioner raises none, as to the validity of the terms of the sentence.

2. After the remand of the cause to the district court, petitioner there contended, for the first time, that the order revoking probation was vulnerable because it was not shown by the transcript of record that the court conducted a hearing on the question whether petitioner violated the conditions of his probation. (See Pet. 19-22, 23-24.) We agree with petitioner that such a hearing was a necessary condition to the exercise of the court's discretion in revoking probation (*Escoe v. Zerbst*, 295 U. S. 490; *Burns v. United States*, 287 U. S. 216), but we think that his contention is both unseasonable and without substance. As we have stated, the sole function of the district court on

the remand of the case was to modify the sentence imposed so that it did not exceed the original sentence. The remand did not reopen the entire proceeding and permit petitioner to urge for the first time a contention which he had not urged either in the circuit court of appeals or in this Court on the earlier appeal. Accordingly, we submit that petitioner's present contention is untimely. In any event, there can be no serious question that petitioner did, in fact, have a hearing before the district court ordered his probation revoked. While it is true, as petitioner states, that the transcript of record contains no stenographic report of such a hearing, the fact that a hearing was had is shown by the colloquy between petitioner's counsel and the district judge when the matter was argued in the district court on the remand of the case (see R. 40, 42-43, 47, 54-59, 61-62). Moreover, on the basis of the record when the case was previously before this Court, the Court stated that the order revoking probation was entered after the district court had conducted a hearing (320 U. S. at p. 265).

3. Immediately after petitioner was placed on probation in 1938, he was advised by the probation officer of the conditions of his probation (see R. 41-44). Petitioner now apparently urges, again unseasonably, we believe, that despite the fact that the probation officer's statement recited that the conditions of probation were ordered by the court, the court failed to make such an order

(Pet. 18-19). Whatever the situation may have been at the time petitioner was placed on probation, it is clear that on September 21, 1939, almost three years before he violated the conditions of probation, the district court entered an order imposing general terms and conditions of probation "upon each and every person heretofore and hereafter placed upon probation" (R. 10-11). All the conditions then laid down were the same as those which had been made known to petitioner by the probation officer. In these circumstances, we think it clear that the conditions of probation imposed on petitioner were, at least, adopted by the court, even if it be assumed that they originally were not prescribed by it, and that petitioner was bound to comply with those conditions.

CONCLUSION

The case was correctly decided below, and there is involved no conflict of decisions or question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE 1945.